SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

NO. 553

OCTOBER TERM, 1967

MIDWEST-RALEIGH, INC., THE TRAVELERS INSURANCE COMPANY, INTERSTATE ENGINEERS & CONSTRUCTORS, INC., and THE FIDELITY & CASUALTY COMPANY OF NEW YORK et al., Petitioners,

v.

EASTERN GAS & FUEL ASSOCIATES, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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v.

EASTERN GAS & FUEL ASSOCIATES, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

The Respondent, Eastern Gas & Fuel Associates, respectfully prays that a Petition for a Writ of Certiorari by Petitioners, Midwest-Raleigh, Inc., The Travelers Insurance Company, Interstate Engineers & Constructors, Inc., and The Fidelity & Casualty Company of New York, to review the judgment of the United States Court of Appeals for The Fourth Circuit entered in this cause on March 7, 1967, be denied.

OPINIONS BELOW

The opinion of The United States District Court for The Northern District of West Virginia will be found in the certified appendix (94a-112a), and it is reported in 253 F. Supp. 954. The opinion of the Court of Appeals is reported in 374 F. 2d 451 and will be found in the appendix to the Petitioners' petition at 1a-8a.

STATEMENT OF THE CASE

Respondent desires only to amplify the statement of the case as contained in the petition in that the statement therein presented wholly fails to include matters and things known to Interstate, and which should have controlled their activities particularly relating to safety precautions and measures that should have been employed and used by them in the dismantling of the plant. It assumes in paragraph 4 of Petitioners' Brief that Harold Sargeant, who was the active head of Interstate, was wholly and entirely innocent and had no knowledge of the dangerous operation under his control. It assumes as a fact that Sargeant was told that the shaft was filled, etc. The preponderance of the evidence is otherwise. The physical set up makes such a lack of knowledge by Sergeant an impossibility. Mr. Sargeant knew this was a gaseous mine, as he stated at T. Page 40 (26a), that he knew this was a gaseous mine. He stated the concrete pad, or slab, was practically the "center of the operations of the job", (T. 58) (28a), and that his men dropped debris and material on the slab — (T. 59) (29a). He testified he had not seen the trap door on top of the slab because his own men had deposited so much debris on the slab—(T. 63) (30a).

The testimony of Harold Sargeant shows that despite his training and experience as a mining engineer, his familiarity with the existence of the shaft, the gaseous nature of the mine, and the fact that the slab was the "center of operations", including the use of cutting torches, neither he nor any of his employees ever made any gas tests — (T. 64) (30a). As a matter of fact, even though he knew the contract required him

to use "extreme care", he made no provisions for gas tests even though his own foreman (decedent Ice) reminded him this was a "hot" mine and expressed great concern! — (T. 83-84) (30a-31a). And this was 3 to 4 weeks *before* the explosion — (T. 85) (32a). It was with knowledge of these facts that he and his employees continued the use of cutting torches, which discharge highly combustible gases and create flame. (T. 88-89) (33a-34a).

He admitted knowledge of small fires being started by his burning operations (T. 99) (34a-35a); that these in fact occurred on top of the slab, as well as in its immediate vicinity (T. 100) (36a); that the fire was "flying around" from the torches (T. 109) (37a); and that there was so much fire around the top of the slab that "it looked like a 4th of July exhibit." (T. 111) (37a).

We contend that Interstate's knowledge of these facts, together with knowledge that this was a gaseous mine, and the expressions of concern made to Sargeant by Mr. Ice, convict Interstate of negligence of the greatest degree, and can hardly be said to constitute the "extreme care" which they agreed to exercise.

Nowhere in the record is there anything to indicate the contract between the parties was intended to cover only surface prevention of fire, accident, etc.

Likewise, there is nothing in the contract between the parties that the "extreme care" required of Interstate did not cover the entire dismantling process, whether it be above or below the surface, and which has been interjected in the argument of petition, without any basis in fact.

We cannot pass without comment the statement on pages 5 and 6 of Petitioners' Brief, wherein they say:

> "In other words and contrary to all prior decisions elsewhere in the country on this point, the Fourth Circuit Court of Appeals now holds that an indemnity provision general and 'unqualified" in its terms, will be extended to protect the indemnitee against its own negligence and that in the Fourth Circuit, at least, it is now up to the *indemnitor* who did not prepare the agreement to limit or qualify the extent of indemnification in order to prevent its application to the indemnitee's own sole negligence!
>
> In no other case in this country has a court ever so held."

These statements grossly misinterpret the opinion of the Court of Appeals so that further comment need not be made, except to refer to the many cases hereinafter cited and quoted.

The Contract

The disputed contract between Eastern (Owner and Seller) and Interstate (Contractor and Purchaser), and the whole thereof, was filed with the complaint as Plaintiff's Exhibit No. 1, and for the complete contract reference is now made to that exhibit. We hereinafter quote the pertinent parts of the contract, which counsel for Respondent believe to be relevant to the matters in dispute (9a).

> "Purchaser will furnish all labor, supervision, equipment, tools, etc., required for performance of this work."
>
> "Purchaser will perform all work in such a manner so that he, his men, or his equipment will not delay or interfere with the normal operation of the mine, the new Coal Cleaning and Preparation Plant or any other "Eastern" activity required or taking place in or adjacent to the work site area, also will not block any roadway and/or railroad tracks."
>
> "Purchaser will prior to removal of equipment, etc., and prior to use of cutting torches, saws or other tools and/or equipment will remove all coal and/or coal dust from said equipment, building, etc., by hosing down all structures inside and out and will otherwise perform this work with all safety precautions including stand-by first aid fire fighting facilities and will exercise extreme care in the performance of this work to prevent fire and/or other damage or accident to property and persons of the Seller or others."

"Purchaser will keep someone at site for a reasonable time after cutting by torch or any other method and will make certain that all equipment and power are properly shut down or off before his employees leave the work site."

"Note: It is understood by both Purchaser and Seller that a serious fire could possibly put Federal No. 1 Mine out of operation for two years."

"Purchaser will have right to come on to Eastern's property to perform this work."

"Purchaser will protect and indemnify Eastern against loss or damage to property and injury and death to persons resulting from, arising out of or incident to the performance of this contract."

"Purchaser, during the period of this contract will maintain Bodily Injury Insurance in limits of not less than $500,000.00, *to cover any liability* including collapse arising out of removal and dismantling, clean-up work, loading and transporting of the items stated herein."

"Purchaser will also maintain Workmen's Compensation Insurance for any employees engaged in this activity."

"Certificates of Insurance for Bodily Injury and Property Damage and Workmen's Compensation will be submitted to Seller's Insurance Manager, Koppers Building, Pittsburgh 19, Pa., *before* Purchaser commences any activities."

From the above, the following should be clear, as the wording lends itself to but one interpretation:

1. Contractor was vested with the duty of supervision.
2. Contractor was to perform the work with all safety precautions.
3. Contractor was to use *extreme care* in the performance of the Contract.
4. Contractor was to protect and indemnify Owner against loss or damage to property and injury or death to persons resulting from, arising out of, or incident to the performance of the Contract.
5. Contractor, during the Contract, was to maintain bodily injury insurance in limits of not less than $500,000.00 per accident, and property damage insurance in limits of not less than $500,000.00 to cover *any liability* during its work.

Consider all of this, together with the fact that the Certificate of Insurance filed with plaintiff (copy of which is filed with Respondent's complaint as "Plaintiff's Exhibit No. 2) (17a), contained the following provision: "Policy condition as to Exclusions of Explosions and Collapse hazards are deleted and coverage thereon is included."

It must be kept in mind that the insurance certificate had to be filed with Respondent before the Petitioners started the work of dismantling, and it is reasonable to believe that Respondent had to accept and approve the same. (Our emphasis)

ARGUMENT BY POINTS

I. The Court of Appeals Acted in Harmony With the Erie Principles and Doctrine and Did Not Disregard West Virginia Law.

The *Erie* case, to which counsel for Petitioners refer, is *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), holding that federal courts in diversity cases may not disregard the substantive law of the state. *Associated Engineers, Inc. v. Job,* 370 F. 2d 633 (8th Cir. 1967).

The District Court adopted the position that the West Virginia case of *Bowlby-Harmon Lumber Co. v. Commodore Services, Inc.,* 144 W. Va. 239, 107 S. E. 2d 602 (1959), established West Virginia law on the subject. But in fact, at page 248 of the official report, the West Virginia Court, in pure dictum, observed:

> ". . . Moreover, to relieve a party from liability for his own negligence by contract, language to that effect must be clear and definite . . ."

The Court of Appeals gave intent consideration to this area of the case and found no West Virginia statute thereon and properly termed the Bowlby-Harmon case statement as dictum. The Court of Appeals found the contract language "clear and definite" and expressive of the intent and meaning of the parties. It was noted in the opinion that in West Virginia contracts of indemnity against one's own negligence are not against public policy. *Borderland Coal Co. v. Norfolk & W. R. R. Co.,* 87 W. Va. 339, 104 S. E. 624 (1920).

Moreover, in West Virginia, "When the provisions of a written instrument are clear and unambiguous they will be given full force and effect according to their plain terms and provisions." *Mace v. Carpenter & Lloyd,* 147 W. Va. 322, 127 S. E. 2d 254 (1962).

On page 11 of Petitioner's brief, counsel concludes that "the West Virginia Court requires 'clear and definite' language or 'clear and explicit' language, or 'clear terms'." This statement, it is respectfully submitted, is not well founded.

First, the Bowlby-Harmon case statement is clearly dictum. The West Virginia opinion refers to other cases from other jurisdictions by the introductory word "See". Two of these cases are then cited and quoted by counsel for Petitioners. One is *Carstens v. Western Pipe & Steel Co.,* 142 Wash. 259, 252 Pac. 939 (1927), which is a landlord-tenant lease contract. Counsel for Petitioners quote the old Washington case and include a quote therefrom, taken from the older English case, *Price & Co. v. Union Lighterage Co.,* 6 British Ruling Cases 119 (1904), which is a carrier case involving a contract for liability exempting loss or damage "which can be covered by insurance."

Counsel for Petitioners cite and quote from the Annotation in 175 A.L.R. 8 (1948). This Annotation springs from a Washington case, *Griffiths v. Henry Broderick, Inc.,* 27 Wash. 2d 901, 182 P. 2d 18 (1947), which is not favorable to Petitioners herein and is certainly the more current expression of the Washington Court.

Counsel for Petitioners also cite and quote from *Cerny-Pickas & Co. v. C. R. Jahn Company,* 4 Ill. App.

2d 164, 123 N. E. 2d 858 (1954), which was cited in the West Virginia case reference.

This Illinois case was decided by the First District Court of the Third Division of the intermediate appellate court system of the State. The case relates to landlord-tenant fire insurance coverage relations. The case was not published except in abstract form and the part quoted in Petitioner's brief is the publishing company's edited syllabus point, not appearing in the official reports. But the important fact to be considered is that the case was reversed in the Supreme Court of Illinois in *Cerny-Pickas & Co. v. C. R. Jahn Co.*, 7 Ill. 2d 393, 131 N. E. 2d 100 (1955). Point 2 of the syllabus and the Court's opinion clearly indicate the law of Illinois. We quote from pages 102 and 103 of the opinion:

> "The argument most strongly urged against exoneration of the lessee is that the lease does not in so many words provide that the lessee be free from liability for fires resulting from its own negligence. Of course, if the lease contained such an express provision, that would be the end of the matter. But because the contingency was not covered by express language, it does not follow that the instrument may not, when all of its provisions are considered, show that the parties themselves intended that the lessee should not be liable. That determination is to be made upon a consideration of the instrument as a whole. *MacAndrews & Forbes Co. v. Mechanical Mfg. Co.*, 367 Ill. 288, 11 N. E. 2d 382; *Llewellyn v. Board of Education*, 324 Ill. 254, 154 N. E. 889; *West v. Ranney Refrigerator Co.*, 261 Ill. 560, 104 N. E. 182; *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937."

On page 19 of Petitioners' brief, question is raised as to the use and purpose of the indemnity provision in the contract if it be not to cover the very situation now in issue. Counsel use this approach to argue that the contract language is not "clear and definite" and therefore needs construction. The Washington Court in another case would not agree with this approach. *Union Pacific R. R. Co. v. Ross Transfer Co.*, 64 Wash. 2d 486, 392 P. 2d 450 (1964).

On this point the more recent Illinois case, *Patent Scaffolding Co. v. Standard Oil Co.*, 68 Ill. App. 2d 29, 215 N. E. 2d 1 (1966), 6 Syllabus:

> "Indemnity agreement by which subcontractor agreed to assume liability, be responsible for and indemnify and save harmless contractor and owner for any liability for death or injury to any person or persons or for any property damage or loss of use resulting from or in connection with performance of work specified, and which also provided that subcontractor would assume full responsibility for and hold contractor and owner harmless from any loss or damage to tools and equipment used by workmen and/or subcontractors, was intended to and did cover acts of negligence of indemnitees."

Note this recent Illinois case deals with somewhat comparable contract language. The Court does not require express language to indemnify the indemnitee but merely clear and explicit language. And the Illinois Court held the contract language was not ambiguous—was clear and explicit to meet the test—and did not require invocation of rules of construction. 4 Williston on Contracts. § 609 (3d ed. 1961). In *Associated Engi-*

neers, Inc. v. Job, supra, pages 649-650, this same analysis is developed. The able Circuit Court there points out that judicial references to the "clear" or "definite" or "unequivocal" language do not mean a requirement of express language, but language from which no doubt may be honorably raised as to meaning and intent of the parties. The Court notes also that this intent and meaning may be supplied by circumstances surrounding the making of the contract and the evident objectives of the parties thereto.

In *Moses-Ecco Company v. Roscoe-Ajax Corporation,* 115 U. S. App. D.C. 366, F.2d 685, 687, the Circuit Court of Appeals, Distr. of Columbia said:

> "Losses incurred by Roscoe-Ajax through its own negligence are not specifically included. And Moses-Ecco urges here, as it did below, that no intention to include such losses 'is otherwise clearly and unequivocally revealed.'
>
> The District Court concluded that the language of the indemnification agreement in the present case was so broad and sweeping as to plainly reveal an intent to encompass losses incurred in whole or in part by the negligence of the indemnitee. * * * We think the view of the District Court is correct."

A very realistic statement of the present-day law is found in the 1965 Proceedings of the American Bar Association's Section on Insurance, Negligence and Compensation law, page 269:

> "Insofar as the contract merely attempts to indemnify for the working contractor's own negligence, it is merely an adoption of the common law

principle of indemnity and is of no particular significance.

However, the Courts have held that a party may contract to hold another harmless from the indemnitee's own neglect and carelessness.

The leading case in New York on this question undoubtedly is *Thompson Starrett v. Otis Elevator*, 271 N. Y. 36. It was decided there that adult contracting parties could expressly contract that one party be liable for any damage sustained by the other, even though the entire fault might lie actively on the shoulders of the indemnitee. This case, which now seems to have general acceptance in most jurisdictions and in the Federal Courts, puts at rest the counter-argument that it was against public policy to pass the burden of paying for one's own wrong to another.

The court did, however, hedge this decision with the proviso that the contractual language must be express and unequivocal. (See *Broderick v. Cauldwell-Wingate Co. Inc.*, 281 A. D. 904; 120 NYS 2d 289, aff'd 305 N.Y. 872.)

However, as time passed the courts have gradually realized (*relaxed*) this rule so that no longer need the indemnification for one's own negligence be express or explicit as long as the intent is clear and unambiguous.

In *Salamy v. New York City Railroad Co.*, 1 A. D. 2d 27, use of a private crossing over defendant's tracks was allowed pursuant to a written agreement with the third-party defendant but it

contained no express covenant that the Licensees would be liable for the Railroad's own negligence. Yet, the court sustained a right to indemnity thereon saying:

'The intention is the thing which must appear clearly and unequivocally, however, and the agreement need not contain express language referring to the negligence of the indemnitee. The requirements of the rule are met if such an intention may be clearly implied from the language, purposes of the agreement, and all the surrounding facts and circumstances.'

See also:

Jordan v. City of New York, 3 A.D. 2d 507, aff'd without opinion, 5 N.Y. 2d 723; *Korzak v. Curry Auto Rental Inc.,* 17 Mis. 2d 685 (N. Y.); *Burke v. City of New York,* 2 N. Y. 2d 90; *General Electric Co. v. Hatzel & Buehler,* 19 A. D. 2d 40 (N. Y.) *Southern Pacific Co. v. Fellows,* 71 Pac. 2d 75."

As to how other jurisdictions and by far the majority thereof have construed language somewhat similar to the language of the contract under consideration, we will attempt very briefly to recite some of the same.

There is pertinent precedent in our own Fourth Circuit, and we find it in Judge Soper's written opinion in the case of *Atlantic Coast Line Railway Co. v. Robertson,* 214 F. 2d 746 at 753 (1954):

"* * * Certainly it is true when the injury is caused by the negligent act of the indemnitor; and

in this case the language is broad enough to cover loss for any injury caused by the negligence of either party to the contract for it specifies loss, injury, or damage of *any* and every character and howsoever caused that may be sustained in connection with the switching power of the Industry over the sidetrack."

We now submit some recent cases from the various Circuits, which we believe fully substantiate and support our position and which clearly indicate the thinking regarding Indemnity Agreements since 1948.

Second Circuit—*Rice v. Pennsylvania Railway Company* 202 Fed. 2d 861 (1953)

Third Circuit—*Seaboldt v. Pennsylvania Railway Company* 290 F. 2d 296 (1961)

Fourth Circuit—*Atlantic Coast Line Railways Co. v. Robertson* 214 F. 2d 746 (1954)

Fifth Circuit—*Birmingham v. Louisville & N. R. C. Co.* 316 F. 2d 858 (1964)

Jacksonville Terminal Co. v. Railway Express Agency 296 F. 2d 256 (1961)

Sixth Circuit—*General Acc. Fire & Life Assurance Corp. v. Smith Oby Co.,* 272 F. 2d 581 (1959)

Seventh Circuit—*Insurance Co. of N. A. v. Elgin, J. & E. Railway Co.,* 229 F. 2d 705 (1956)

Chicago & N. W. Railway Co. v. Chicago Fuel Co. 183 F. 2d 630 (1950)

Eighth Circuit—*Anthony v. L. & A. Railway Co.* 316 F. 2d 858 (1963)

Aluminum Co. v. Hully 200 F. 2d 257

Ninth Circuit—*Unitec Corp. v. Beatty Safeway Scaffold Co.* 358 F. 2d 470 (March 19, 1966)

Booth-Kelly Co. v. South Pacific Co., 183 F. 2d 902 (1950)

District of Columbia Court of Appeals—*Moses-Ecco Co. v. Roscoe Ajax Corp.*, 115 U. S. App. D. C. 366, 320 F. 2d 685 (1963)

An interesting case very recently decided, May 9, 1966, by the United States District Court E. D. Louisiana, but following Ohio law and precedent and particularly *General Accident Fire and Life Assurance Corp. Ltd. v. Smith and Oby Co.*, 272 F. 2d 581 (6th Circuit, 1959) and styled *United States Fid. and Guaranty Co. v. O'Neil Company*, reported in 254 F. Supp. 140, construed the following provision of an indemnity agreement:

"Article IX—(a). Sub-contractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Sub-contractor, his agents or employee; and Sub-contractor shall defend all suits brought against the Contractor on account of any such accidents and shall reimburse Contractor for any expense, including reasonable attorney's fee sustained by Contractor by reason of such accidents."

The Court in its opinion said:

"Under Ohio law contracts of indemnity purporting to relieve one from the results of his own

negligence are not contrary to public policy if the indemnity provisions express that intent in clear and unequivocal terms. *George H. Dingledy Lumber Co. v. Erie R. Co.*, 102 Ohio St. 236; 131 N.E. 723 (1921); *St. Paul Mercury Indemnity Co. v. Kopp, Ohio App.*, 1954, 121 N.E. 2d 23. The word "negligence" is not sacrosanct if the language expressed in the agreement shows a clear intention to hold the negligent indemnitee harmless. *General Acc. F. & L. Assur. Corp., Ltd. v. Smith & Oby Co.*, 6 Cir., 1959. 272 F. 2d 581, 77 A. L. R. 2d 1134; *George H. Dingledy Lumber Co. v. Erie R. Co., supra.;*" also

(2) "We are convinced that the parties to the present agreement, in clear and unequivocal language expressed the intention that Blount should be held harmless and indemnified against all claims for damages arising from accidents suffered by O'Neil's employees occasioned or caused by O'Neil or its employees, regardless of whether Blount was negligent."

A reading of the cases hereinabove set forth clearly will indicate that the language used in the contract of Petitioners and Respondent is much clearer and more definitive of the rights of the parties than the language used and construed therein to be broad enough to cover one, even in case of his own negligence. In other words, Respondent believes the contract to be unambiguous and the intent and purpose and the coverage is clear that Respondent was to be indemnified against any liability arising out of or incident to the Petitioners' performance of the contract.

II. The Court of Appeals Responded to Its Judicial Responsibilities in Reversing the District Court on Interpretation and Application of the Indemnity Contract Terms and Provisions and Did Not Disregard Federal Rules of Civil Procedure, Rule 52(a).

Rule 52(a) provides in part that "Findings of fact shall not be set aside unless clearly erroneous."

Counsel for Petitioners takes the position that the Court of Appeals violated this rule in disregarding the District Court's "significant and dispositive findings of fact, from which the District Court concluded otherwise." The Brief of Counsel for Petitioners, pages 14-15, itemizes seven "findings of fact" by the District Court. Findings 5, 6 and 7 are of more immediate concern, since they deal with application of the indemnity contract language.

At the outset, it may be noted that the basic problem in the case, as presented by counsel for Petitioners, is one of interpretation of the contract of indemnity.

On this point, *United States v. John McShain, Inc.*, 258 F. 2d 422 (D.C. Cir. 1958), certiorari denied 358 U.S. 832, 79 S. Ct. 52, 3 L. Ed. 2d 70 (1958), holds, pages 424-425:

> "The only question before the District Court was the question of the interpretation of written documents. That is a 'question of law' as to which this court is not bound by the 'clearly erroneous' provisions of Fed. Rules Civ. Proc. rule 52 (a) * * *"

Earlier in this Brief of Respondent the status of the West Virginia law on contract language require-

ments incident to indemnitee's indemnity has been discussed. The District Court adopted dictum from a West Virginia case and counsel for Petitioners in their brief have enlarged the language to state that the West Virginia law requires "clear and definite" and other comparable language in indemnity contracts to so indemnify the indemnitee. The Court of Appeals reviewed this area of the case and firmly held the District Court was wrong, using the words "We cannot agree". On page 17 of the Petitioners' brief, complaint is made that the Court of Appeals did not "label" the District Court's findings as clearly erroneous. The Court of Appeals holding is firm and plain and it appears unnecessary to argue on the magic of particular labels. In *Jacksonville Terminal Co. v. Railway Express Agency, Inc.*, 296 F. 2d 256 (5th Cir. 1961), the Court reversed a District Court decision but did not employ the words "clearly erroneous or unsupported by the record", as counsel for Petitioners argue is necessary. Rehearing was denied in the Jacksonville Terminal Co. case and certiorari was likewise denied, 369 U.S. 860, 82 S. Ct. 949, 8 L. Ed. 2d 18 (1962).

In *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379 (9th Cir. 1964), the Court, at pages 401-402, rules it was not bound by the "clearly erroneous" language of Rule 52(a) when reviewing a District Court decision on issues relating to applicability of Nevada law and negligence of the parties involved.

The determination of the Court of Appeals is greatly distorted by way of improper and unjust inference on page 19 of Petitioners' Brief. It is there stated, "The Court of Appeals has thus held that *in all in-*

stances the *only* meaning to be given to imprecise indemnity provisions is to protect the indemnitee against his own negligence, since the common law through implied indemnification protects the indemnitee otherwise than for his own primary negligence". This is a very gross misstatement, improper deduction and an avoidance of the true and real adjudication of the Court of Appeals. The second paragraph on page 19 of Petitioners' brief is likewise an apparent avoidance of the true meaning and understanding of the opinion of the Court of Appeals.

CONCLUSION

For the foregoing reasons, your Respondent urges that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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